PRIVATE CLAIMS AGAINST THE STATE.

PREVIOUS to the existence of tribunals vested with power to hear and determine claims against the government of state or nation, the question of the civil responsibility of the latter towards private parties received little if any judicial discussion or settlement. The validity of pecuniary or other civil obligations on the part of the government in many cases was undoubted, but they lacked the sanction of the ordinary remedies. The aggrieved party could not summon the government before the courts; they could take cognizance of his cause at most where the government itself had invoked their jurisdiction and he sought to reduce its claim by set-off,[1] or in other cases where its rights could be adjudged without direct subjection to the jurisdiction of the court.[2] In the absence of a direct remedy, any right was necessarily precarious. The question of liability could not become a subject of profitable discussion until the question of jurisdiction was disposed of.

I. *Jurisdiction.*

It has always been accepted as an undisputed maxim of the common law that the sovereign cannot be sued except by his own consent. This principle commended itself by the apparent cogency of its logic. The courts exercised their jurisdiction under the authority of the sovereign and their mandates issued in his name: How, then, could the king be imagined to be under the control of his own courts? How could he issue his writ commanding the sheriff to command him, the king, to appear, *etc.*?[3] The ordinary form of action would thus be inapplicable against the sovereign; even if there had been no formal difficulties, the courts would naturally have declined to

[1] U. S. *vs.* Ringgold, 8 Tet. 163; but see U. S. *vs.* Eckford, 6 Wall. 484.

[2] The Siren, 7 Wall. 152.

[3] Chitty, Prerogative, p. 334. Blackstone, Commentaries, iii, p. 254.

entertain jurisdiction when they could not compel obedience to their decrees. Only voluntary submission on the part of the crown could secure a judicial hearing in favor of private claims against it. And this was granted in England at an early date. The petition of right, the oldest remedy, is said to have originated in the time of Edward I; another mode of redress was provided by the bill of manifestation of right (*monstrans de droit*) during the reign of Edward VI. The petition of right, though granted as a matter of grace, was regarded as the birthright of the subject, and was available where other remedies failed. Upon filing of the petition the king's fiat, "let right be done," was granted by the attorney-general, and the issues thereupon became triable either in chancery or in the court of exchequer. In these proceedings the crown enjoyed certain privileges; an interesting and forcible statement of the various defects (from the point of view of the petitioner) may be found in Brougham's famous speech on law reform. The most serious objection in theory was doubtless the lack of redress if the attorney-general refused his fiat; as a rule, however, the fiat issued as of course. It was formerly doubtful in what way effect could be given to money judgments against the crown; now the duty is laid upon certain treasury officials to pay out of funds legally applicable for that purpose; some sort of appropriation by Parliament would therefore seem to be necessary. The English law on the subject is now regulated on the basis of the former practice by 23 and 24 Victoria, chapter 34.

Neither of the remedies against the sovereign in use in England became part of the common law of the American states upon their assuming independence. In England and in the colonies, in all relations of property, the sovereignty was represented by the crown, but in this country all the rights of the crown in this respect devolved upon the people. And while, upon the constitutional organization of the people, the judiciary department succeeded to all the powers held by the courts in England, the executive became vested only with such powers as were expressed and specified in the written constitu-

tions. All residuary public power, even such as was not of a strictly legislative nature, remained in the legislature. Especially, in the absence of statutory provisions, all right of disposition with regard to the public property which had belonged to the crown, was claimed and exercised by the legislature. The legislature alone had the power to release rights vested in the people, to validate void contracts, to waive rights and defences or to recognize claims against the state for damages.[1] The privilege of petitioning for the redress of any grievance was guaranteed by the federal and by most state constitutions, and petitions of right respecting private claims against the government were directed to the legislature. But the English practice of delegating the investigation and adjudication of such claims to the courts was not followed, and the legislative bodies themselves passed upon all claims presented to them. Where a claim was allowed, the proper relief was given by a statute enacted for that purpose. It does not require much argument to show that this discharge of judicial functions by legislative methods must have been inadequate and unsatisfactory. The following, written with reference to the condition of things in Congress, must apply equally to any legislative body to which many private claims are presented for disposition:

> Such was the extent of these claims and the difficulty of reaching the real facts in each case that few of them were ever acted upon, and many honest creditors of the United States were turned away without a hearing, and others were deterred from presenting their petitions for redress by the difficulties in the way of reaching a final determination, while it was occasionally found that upon hasty consideration or imperfect *ex parte* evidence a claim was allowed and paid which was, to say the least, of doubtful validity. Committees could not constitute themselves courts for the trial of facts. They had not the time to devote to that kind of investigation, to the interruption or exclusion of their duties to the country on the great national questions which were always pending in Congress. They could not effectively examine the plaintiff's witnesses to any great extent before themselves, and they were not sufficiently familiar with

[1] People *vs.* Stephens, 71 N. Y. 527, 540, 548.

the matters in controversy to be able to procure witnesses for the government. Claimants in fact presented only *ex parte* cases, supported by affidavits and the influence of such friends as they could induce to appear before the committee in open session or to see the members in private. No counsel appeared to watch and defend the interests of the government. Committees were therefore perplexed beyond measure with this class of business, and most frequently found it more convenient and more safe not to act at all upon those claims which called for much investigation, especially when the amounts involved seemed large. Moreover, when bills for relief in meritorious cases were reported, few of them were acted upon by either house, or, if passed by one, were not brought to a vote in the other house, and so fell at the final adjournment, and if ever revived, had to be begun again before a new Congress and a new committee, and so on year after year and Congress after Congress.[1]

These manifest evils of legislation on private claims led to the adoption in a number of state constitutions of clauses directing that legislative provision should be made for bringing claims against the state into court; but thus far very few of the legislatures have complied with this mandate. In the absence of constitutional provisions to the contrary, it is within the legislative power to commit the adjudication of private claims against the state to the courts, since this is plainly not the delegation of a legislative function. Whether the legislature has the power to create a special court for that purpose, will of course depend upon the particular provisions of the constitutions. Neither the system adopted by the United States nor that developed in the state of New York rests upon special constitutional authority.[2]

Congress, in 1855, created a court of claims by virtue of its constitutional power to establish inferior courts.[3] Under the provisions of this act, however, the decisions of the court were

[1] Richardson, 17 Ct. Cl. Rep. p. 4.

[2] Seven of the states allow themselves to be sued, three of them in obedience to a constitutional injunction. These states are: Alabama, Mississippi, Nebraska, New York, North Carolina, Virginia and Wisconsin. In five states the constitution forbids the state to be made a party defendant.

[3] U. S. Rev. Stat., §§ 1049 *et seq.*; a full account of the history and jurisdiction of the court of claims is given by Justice Richardson in 17 Ct. Cl. Rep. p. 1.

reported back to Congress for special action on each separate case, and the committee of claims felt bound to re-examine each claim upon its merits. In this way the beneficial effects of the whole act were almost rendered nugatory. By an amendatory act, passed March 3, 1863, Congress provided, therefore, that all judgments of the court should be paid by the treasury out of any general appropriation made by law for the payment of private claims.[1] As the same act, however, provided that no money should be paid out of the treasury for any claim till after an estimate of the appropriation for the purpose should have been made by the secretary of the treasury, the supreme court held that this, by implication, gave power to the secretary to revise the decisions of the court of claims, and that such decisions, consequently, did not bear the character of judgments over which, under the constitution, the supreme court could exercise appellate jurisdiction.[2] The obnoxious provision was repealed in 1866, and the awards of the court of claims were from that time on recognized as final and conclusive judgments. By act of March 3, 1887, the United States circuit and district courts were vested with substantially concurrent jurisdiction with the court of claims.[3]

In New York, where the legislature has no constitutional power to establish other than inferior local courts, the bodies to which the adjudication of claims against the state has from time to time been committed bear merely the character of commissions; their awards have not the full force and effect of judgments. The supreme court has not been intrusted with this jurisdiction. A judicial determination of claims against the state was first felt to be a necessity in connection with the state ownership and management of canals. It was committed to a board of canal appraisers by act of 1870, chapter 321. For other claims against the state the legislature, in 1876,[4] created a board of more general jurisdiction, called the board

[1] U. S. Rev. Stat., § 1089.

[2] Gordon *vs.* U. S., 2 Wall. 561; for opinion see 1 Ct. Cl. Rep., p. xxiii.

[3] Suppl. Rev. Stat., 2d ed., p. 559.

[4] Laws of 1876, ch. 444.

of audit, consisting of the comptroller, the secretary of state and the state treasurer. These two boards were finally merged in 1883 into a more independent commission, called the board of claims,[1] consisting of three commissioners, two of whom must be counselors of the supreme court. An appeal from the awards of this board lies to the court of appeals.[2] The awards are reported to the legislature, and require a special appropriation to become payable; so that now, as before, the final disposition of claims against the state depends upon legislative action. It was plainly the intention of the legislature, however, to assimilate the powers and proceedings of the board of claims to those of a regular court, and the necessary appropriations are made as a matter of course and without a re-examination of the merits of the respective claims.

Whether the determination of private claims against the government be committed to a court with full judicial powers or to a board of a special character, the view that such claims receive judicial consideration as a matter of grace rather than as a matter of right may find expression both in limitations of jurisdiction and in a number of peculiar features distinguishing the statutory remedy from an ordinary action. These special features correspond about to what are known in the civil law as *privilegia fisci* — privileges which the spirit of modern legislation does not favor. The New York and the federal statutes differ in this respect. The only advantage which the New York law gives to the state is a short period of limitation—two years—while the federal law recognizes the ordinary six years' limitation. Otherwise the federal statute is far more favorable to the government, although the tendency is to place claimant and government on a basis of greater equality. So, under the former law, no party in interest had the right to testify for the claimant,[3] but this provision was repealed in 1887. The government has a right of appeal in every case; the claimant only where a certain amount is involved. A new

[1] Laws of 1883, ch. 205. [2] Laws of 1887, ch. 507.
[3] Rev. Stat., § 1079.

trial is granted in favor of the government at any time within two years upon any evidence of wrong, fraud or injustice; in favor of the claimant only at the same term in which judgment is rendered and only upon the same grounds on which a new trial is granted at common law. Any fraud practised or attempted in the prosecution of the claim forfeits the claim, *ipso facto*.[1]

Special safeguards against fraudulent claims are certainly justifiable. The government is more exposed to fraud than an individual; and the public interest, which is the interest of nobody in particular, may justly claim the special protection of the law to counterbalance the natural watchfulness with which private interests are guarded. But the privileges of the government should not go beyond the call of such natural disadvantages. Neither under the federal nor under the New York law are issues of fact tried by a jury. This, perhaps, can hardly be called a governmental privilege, but it characterizes the nature of the relief by showing that the constitutional guaranty of a trial by jury is not considered as applicable.

Of greater importance than these *privilegia fisci*, privileges relating chiefly to procedure, are the limitations imposed upon the jurisdiction of the tribunals hearing claims against the government. Such limitations, while they do not amount to an absolute denial of the liability of the government on claims covered by them, in principle leave the claimant in the position in which all claimants were formerly: he is relegated to his common law and constitutional right of petitioning the legislature for relief. Of course the legislature can by special act provide for the judicial hearing and determination of any claim, creating a jurisdiction for that purpose. This course is frequently resorted to by Congress, and the power to refer specific controverted questions to the court of claims is also vested in either house of Congress, or any committee of either house, and in any executive department.[2]

[1] Rev. Stat., § 1086, Act of April 30, 1878.

[2] Act of March 3, 1883, §§ 1, 2. Act of March 3, 1887, § 14.

The jurisdiction of the court of claims originally embraced all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, and all claims referred to it by either house of Congress.[1] It was subsequently extended to cover counter-claims of the government, and other specific classes of cases were added from time to time. It was the evident desire of Congress to promote still further the liberal policy of allowing suits against the government which led to the passage of the act of March, 1887, known as the Tucker Act.[2] With certain specific exceptions this act extended the jurisdiction of the court of claims and the concurrent jurisdiction of the circuit and district courts to

all claims founded upon the constitution of the United States or any law of Congress, except for pensions, or upon any contract express or implied with the government of the United States, or for damages liquidated or unliquidated in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity or admiralty if the United States were suable.

This enumeration would seem to cover all private causes of action except tort. The supreme court, however, has taken a different view. Inasmuch as the law makes no express provision for the satisfaction of other than money judgments, it was held that the jurisdiction of the court extended only to money demands.[3]

It seems [the court said] that in point of providing only for money decrees and judgments the law is unchanged, merely being so extended as to include claims for money arising out of equitable and maritime as well as legal demands. We do not think it was the intention of Congress to go farther than this. Had it been, some provision would have been made for carrying into execution decrees for specific performance or for delivering the possession of property recovered in kind.

[1] Rev. Stat., § 1059. 1 Suppl. Rev. Stat., 2nd ed., p. 559, note.
[2] 1 Suppl. Rev. Stat., 2nd ed., p. 559.
[3] U. S. *vs.* Jones, 131 U. S. p. 1.

The court therefore refused to compel the issue and delivery of a land patent. Two of the justices[1] dissented, and the dissenting opinion says:

> The manifest purpose of this new act was to confer powers which the court of claims did not previously have, and to authorize it to take jurisdiction of a class of cases of which it had not cognizance before. To say that under such circumstances the new statute is to be crippled and rendered ineffectual in the only new feature which it has in regard to the jurisdiction of that court, is in my mind a refusal to obey the law as made by Congress in a matter in which its power is undisputed. It is clear to me that Congress intended by this act to enlarge very materially the right of suit against the United States, to facilitate this right by allowing suits to be brought in the circuit and district courts where the parties resided, and that it also designed to enlarge the remedy in the court of claims to meet all such cases in law, equity and admiralty against the United States as would be cognizable in such courts against individuals.

As construed by the majority of the court in this case, the act of 1887 made but a very slight advance in the development of the right of suit against the government; for the principle laid down in the opinion seems to cover all claims requiring specific performance and all suits in ejectment, if indeed the latter are not included in the exemption of causes of action sounding in tort — another difficult question involved in considerable doubt.

In view of the difficulties which have arisen through enumerating the causes of action in defining the jurisdiction of the court of claims, the New York law must be considered as marking a distinct step in advance. It confers upon the board of claims jurisdiction over all private claims against the state and counter-claims presented against them. The term private claims is not further defined, but it doubtless means all claims of private parties against the state, and not merely claims arising from private causes of action. This would make the jurisdiction co-extensive with the liability of the state; in other words, the question of juris-

[1] Miller and Field.

diction would be eliminated entirely, and the question of liability presented as one purely of substantive law. This construction seems to be demanded by the constitutional provision prohibiting the legislature from auditing or allowing private claims [1] — a provision which has, however, been construed not to prevent the legislature from removing disabilities and creating legal causes of action, and referring claims thus legalized to the board of claims for judicial action and determination.[2]

The foregoing statement of the law with regard to jurisdiction over state and government would be incomplete unless supplemented by a reference to the various schemes devised by the ingenuity of private claimants, and especially of creditors of defaulting states, in order to overcome the plea of want of jurisdiction in cases where the sovereign power did not consent to be sued. Two of these devices may be very briefly disposed of. The defaulted bonds of Louisiana being largely held by citizens of other states, who found themselves without judicial remedy or redress, several of these states were induced to take from their respective citizens assignments of their claims in order to prosecute them before the Supreme Court of the United States, under its constitutional jurisdiction over controversies between two or more states. The suits were to be brought in the name of the state but for the use of the assignors. The supreme court, however, insisted upon regarding the actions instituted by the respective states as suits brought really by private citizens, in contravention of the spirit of the eleventh amendment, and declined to take jurisdiction.[3] The second device was still more ingenious. The eleventh amendment prohibited only suits against one of the United States by citizens of another state, and was silent as to suits brought against a state by its own citizens. Now it was argued that the judicial power of the United States, irrespective of parties, extended to all cases in law and equity

[1] Art. 3, § 19.

[2] Cole *vs.* State, 102 N. Y. 54; O'Hara *vs.* State, 112 N. Y. 146.

[3] New Hampshire, *vs.* Louisiana, New York *vs.* Louisiana, 108 U. S. 76.

arising under the constitution and the laws of the United States, and that by the act of March 3, 1875, the federal circuit courts were vested with jurisdiction in similar terms, likewise irrespective of parties; consequently it was urged that the circuit court might take cognizance of a suit brought by a citizen against his own state on a federal question.[1] The supreme court, however, again stood upon an historical rather than a literal construction of the constitution, and held that the cognizance of such suits, which were unknown to the law when the constitution was framed, was not contemplated by its provisions.[2]

Under any broad and liberal interpretation of constitutional provisions these two attempts to obtain jurisdiction over a state against its consent were doomed to failure; upon an entirely different footing stands the third plan. Under our system of jurisprudence the courts have always to a certain extent exercised jurisdiction over the agents of the government; the administration has never claimed for its officers that complete immunity from the process of the civil courts in matters belonging to its own province, which in France was insisted upon as an essential part of the principle of the separation of powers, and which there led to the creation of a system of administrative courts. But state and government can act only through the persons of officers, and the question arises: How far does the jurisdiction over officers enable the courts to control the action of the state, and thus serve as a substitute for the wanting jurisdiction over the latter?

We must in this respect distinguish different cases. The courts may hold certain classes of officers liable in damages for non-feasance or malfeasance in their duties, but it is clear that this personal liability of the officer does not directly affect the action or the property of the state: in other words, the jurisdiction over officers affords no means of imposing a liability in damages upon the state or government. It is

[1] This reasoning seems first to have been suggested in the case of Harvey *vs.* the Commissioners, 20 Federal Reporter, 411.

[2] Hans *vs.* Louisiana, 134 U. S. 1.

otherwise where the relief demanded is specific in its nature — where it is sought either to compel an official act by the prerogative writ of mandamus, or to enjoin it by the equitable remedy of injunction, or to recover specific property or funds by the proper common law remedies. No doubt a judgment against the officer in these cases operates against the government in whose behalf he acts. And as a matter of fact this jurisdiction has always been used to subject the action of the administration to an effective judicial control. But the theory and frequently the fact is, that in these cases the courts really enforce the will of the state against the unlawful refusal of its agents to perform their duties; the jurisdiction of the courts is held to aid the administration, not to constrain it. This theory, however, becomes untenable where the state clearly asserts adverse rights, or where the judgment of the court virtually decrees specific performance of contracts which the state has distinctly repudiated by law; for in the latter case the law, even if unconstitutional, cannot be counteracted save through interference with the whole machinery of the government, the compulsion of its highest executive officers and a control of the public funds.

In cases of this kind the plea has always been advanced that the suit, while nominally against the officers, was in reality against the state or government, and therefore beyond the jurisdiction of the court. This plea of want of jurisdiction has confronted the United States Supreme Court in a number of important cases.[1] On principle the court has in its more recent decisions taken the stand that it will look behind the parties of record, and hold the suit to be against the state where the property and the interest of the state are thus directly involved. But on the other hand it will sustain the action where a distinct and specific right of person or property is asserted, and protection or relief is sought against its threatened or consummated invasion by the act of officers asserting an authority which is held to be void. The distinction has been carried to such a point of refinement that

[1] Beginning with Osborn *vs.* Bank, 9 Wheat. 738.

in some cases it seems to resolve itself into the question whether the relief sought is affirmative, when it will be refused, or negative, when it will be granted.[1] Suits have thus been entertained against the highest executive state officers to enjoin them from issuing patents to lands claimed by plaintiffs, although the right of the latter was merely equitable and their legal title had not been perfected.[2] As one of these cases has since been pronounced to go to the verge of sound doctrine, it is probable that the supreme court would refuse to go further and affirmatively order the issue of a land patent. The same court held an action to be improperly brought against the governor of Georgia for the foreclosure of a mortgage on a railroad, where the state held possession and the legal title, on the ground that the state was not only the real but an indispensable party to the action.[3] This case, too, must be held to be decided on the ground that the relief sought was affirmative in its character; for the mere fact that a question of title between the claimant and the state is involved will not necessarily oust the jurisdiction of the courts. Such at least is the inevitable conclusion from the decision in the Arlington case,[4] where the jurisdiction over officers was applied in such a manner as almost to nullify the exemption of the sovereign power from suit. This was an action in ejectment brought against officers holding on behalf of the government possession of land to which the United States claimed title. The United States appeared for the sole purpose of objecting to the jurisdiction of the court, on the ground that the real and proper party defendant was the government. The court, however, by a bare majority, held the action maintainable, and gave judgment in favor of the plaintiffs. The decision really amounted to an evasion of a substantial principle of law by a technical expedient; for the prerogative of the sovereign power not to be sued in its own courts in an action of ejectment becomes

[1] Compare Board of Liquidation *vs.* McComb, 92 U. S. 531, with Louisiana *vs.* Jumel, 107 U. S. 711.

[2] Davis *vs.* Gray, 16 Wall. 203. Pennoyer *vs.* McConnaughy, 140 U. S. 1.

[3] Cunningham *vs.* Macon, *etc.* R. R. Co., 109 U. S. 446.

[4] U. S. *vs.* Lee, 106 U. S. 196.

worthless if its instruments of action, by which alone it can accomplish its purposes, can be substituted in its place. If the sovereign immunity from civil suits is to be upheld, it should be loyally and logically applied; if it leads to such intolerable consequences and is so contrary to justice and the spirit of our law that the courts must seek to evade it, then the whole principle should be condemned and abandoned. This latter view seems to have dictated the prevailing opinion in the Arlington case: the principle was examined in both its theoretical and its historical aspects, and was found to be antiquated.

There are evidently cases where justice demands the adjudication of rights against the state, while the logic of the law apparently forbids it. Apparently, for the conflict is not real. It is believed that subjection to the jurisdiction of the courts is inconsistent with the nature of sovereign power. It is true that the courts themselves derive their power from the state. But the state is an exceedingly complex organism, and its functions are widely divergent. It is guided by proprietary interests, like an individual, in the management of its corporate funds and domain; by public, as opposed to private, interests in the general political administration; while its aim in the dispensation of justice is the purely ideal one of the preservation of law and of rights. The concentration of these various functions in one power would be impossible without a separation of organs. Therefore, the administration of justice in every civilized state is vested in organs which are, to all intents and purposes, independent of the government in the narrower sense of the term. Consequently, when the state appears before the courts on a question of property rights, a party in interest appears before an impartial arbiter, and the proceeding is not open to the objection that the state is judge in its own cause. Thus, on a true conception of the nature of the judicial power, the subjection of the state to the jurisdiction of the courts involves no inconsistency of functions. At the same time, the state retains its identity in the different spheres of its action;

it can use or abuse its sovereign power so as to control or pervert any of its functions. It would, therefore, be absurd to deny that the state can refuse to submit to the jurisdiction of its courts. But why, in the absence of a distinct expression of will, either by the constitution or by the legislature, should a tacit refusal be implied rather than a tacit consent? Would it not be reasonable to assume such a consent where the state descends from the plane of its sovereignty and enters into purely private relations, that is to say, in all civil causes of action?

It is urged that such submission to the jurisdiction of the courts would be against public policy, on the ground that it would be inconvenient and intolerable for the state to defend every executive act in a court of law. But does not the law afford sufficient protection by asserting a complete immunity from liability on the part of the state in most of its relations, just as a similar immunity has been found adequate to prevent vexatious suits against judicial and high executive magistrates, who yet are personally subject to the jurisdiction of the courts? Another argument drawn from public policy is that it would not do to vest the courts with power over the public funds and revenues.[1] But this argument overlooks the point that jurisdiction to hear and determine claims does not necessarily carry the power to enforce them. The position of the state in this respect is different from that of a municipal corporation. Where a judgment is recovered against the latter a court can issue mandamus to its governing body to compel the levy of a tax sufficient to satisfy the judgment; but the governing body of the state is beyond the reach of the process of the courts; and even where a continuing power to levy a tax in favor of creditors is vested in the financial officers of the state, the United States Supreme Court, at least, holds that an action against them is not maintainable, because it is virtually an action against the state.[2] Effective relief against

[1] Briggs *vs.* Lightboats, 9 Allen, 157, 162; Corkings *vs.* State, 99 N. Y. 491, 499.

[2] Louisiana *vs.* Jumel, 107 U. S. 711; Hagood *vs.* Southern, 117 U. S. 52; North Carolina *vs.* Temple, 134 U. S. 22.

the state could be secured only by making all judgments payable out of its unappropriated funds, or, where that would be unconstitutional, by allowing execution against its private property.

It doubtless affords the strongest theoretical argument against the jurisdiction of the courts over the state, that they are powerless to enforce their decrees. Courts do not usually take cognizance of causes unless they are able to grant effective relief, and it has been held that the mere right to sue without the right to enforce judgment is not a judicial remedy.[1] But this objection is theoretical rather than practical; for what is usually sought by the claimant, and what is demanded by the principles of individual right, is an opportunity for judicial hearing and determination of claims against the government; while the compulsion of a defaulting state presents a different question, which is beyond the province of civil jurisdiction. Where the state is suable at present, therefore, the tribunal as a rule has authority merely to determine claims, not to enforce them.[2]

But whatever may be the arguments in favor of this jurisdiction, the law is well settled against it, and is on the whole still strenuously supported by the current of judicial opinion. A change can therefore be brought about only by statutory enactment. The example of the national government and of the most powerful of the commonwealths cannot but aid a development which is so much in accordance with the spirit of modern private law.

II. *Liability.*

The statutes which provide a tribunal in which the government can be sued are generally silent on the question of liability. By implication they assume the possibility of legal claims against the government, and they seek to create a forum with authority to determine them. If, then, some legal liability existed before the remedy, and if it was neither defined nor

[1] R. R. Co. *vs.* Tennessee, 101 U. S. 337.

[2] Carter *vs.* State, 8 Southern Reporter, p. 836.

regulated by statute, it would naturally be presumed to continue unchanged. Even where, as under the federal system, the jurisdiction of the tribunal is limited, this does not mean that with regard to causes of action withheld from it, the liability of the government is on principle repudiated ; such causes simply fall within the residuary jurisdiction of the legislature. But where the legislature is forbidden by the constitution to hear private claims, the limitation of jurisdiction is virtually a limitation of liability. It should, however, be observed that in the absence of, or in addition to, general laws granting the right to sue the government, provision may be made by legislation for special classes of cases, in which a remedy is afforded and a liability expressly or by necessary implication recognized ; this was done by the Canal Acts of the state of New York, by the federal acts regarding Indian depredation claims (March 3, 1891), by that creating the court of private land claims (March 3, 1891) and by many others passed in Congress from time to time.

It is obvious that before the existence of a remedy there would be little occasion to define this liability, to establish its limitations and regulate its operation: it would be potential rather than practical. The action of legislative bodies in granting relief, lacking the guarantees of judicial procedure, would naturally be dictated by equitable considerations, if not by political or even personal influences. Under these circumstances the newly created tribunals have had virtually to create their own jurisprudence, and to develop a new body of law which is by no means in all respects firmly settled.

In the treatment of this subject the simplest distinction to be made is that between cases where a liability is expressly assumed by the government, or cast upon it by statute or the constitution, and cases where a liability results from certain acts or relations without such express declaration. On this basis we may have as causes of action, on the one side constitution, statute, contract, on the other implied contract and tort — all mentioned in the act of 1887 defining the jurisdiction over the United States.

A liability distinctly created by sovereign or governmental act or by contract, presents comparatively few difficulties. A money claim may arise under a constitution, where that instrument fixes the compensation of certain officers or forbids its reduction during a term of office; perhaps, also, where it provides that private property shall not be taken for public use without just compensation. A claim may arise under statute, not only where legislation directly provides for the payment of money, but in all the numerous cases where a liability is created for damages suffered through the act of the government or its officers. Whether a statute creates an individual right against the government, depends sometimes upon the nature of the relation; where, for instance, the law provides a salary for an office, the right to payment attaches, not to the appointment or to the legal title, but to the tenure of the office and the performance of its functions.[1] Government contracts, including loans, are on the whole governed by the ordinary rules applying between private parties, except, of course, in so far as the subject is regulated by statute.[2] Statutory provisions regarding contracts — authority to conclude, form, *etc.* — are very frequent, and modify the general law with respect to nearly every important class of public contracts. Most cases will, therefore, involve questions of statutory construction, not so much perhaps as to the obligations under the contract, as on the point of its validity in its inception. In this respect the government stands on a different footing from individuals and private corporations. Private contracts are as a rule informal, and the apparent and ostensible authority of the agent may bind the principal; but every one dealing with government officers is bound by their actual authority, by every requirement of form, even by the amount of appropriations, which may limit the power to incur obligations;[3] and this not only because all conditions precedent are matters of public law, of which every one must

[1] Butler *vs.* Pennsylvania, 10 Howard, 402.

[2] Donald *vs.* State, 89 N. Y. 36.

[3] Shipman *vs.* U. S., 18 Ct. Cl., p. 138; Dunwoody *vs.* U. S., 143 U. S. 578; U. S. Rev. Stat., § 3679.

take notice, but because it is a vital principle of public policy that the expenditure of public moneys should be hedged in by the strictest rules of law.

The federal statutes give the court of claims jurisdiction on implied contract, thus recognizing a possible liability on this cause of action. The term "implied contract" is vague enough to admit of a certain latitude of construction. It may mean a real contract resting upon concludent acts; this meaning seems to be within the language of the statute when it says: "contract, express or implied, with the government." But we also speak of implied contract when there is an obligation, not at all contractual, but created by law in order to prevent unjust loss or gain, incurred or made without consideration and against the reasonable and presumable intention of the parties. Such implied contract is likewise within the jurisdiction of the court of claims; for it has been defined to embrace cases of a consideration moving to the government, money received by the government to the use of others and money paid by mistake.[1] The practice of the United States Supreme Court in recognizing obligations on implied contract seems somewhat uncertain. So it has been held (not in a case against the government) that while the official relation does not constitute a contract as to compensation, yet, after the duties have been performed, an implied contract springs up for the payment of the salary.[2] The claim was here, in fact, based upon the statute, but the theory of an implied contract made it possible to bring a later statute, taking away the salary, within the constitutional prohibition of laws impairing the obligation of contracts.

It is generally held with regard to municipal corporations that where a public contract requires certain conditions as to form or otherwise which are disregarded, an obligation on implied contract will not arise from performance, because the purpose of the requirement might otherwise be nullified. But the United States Supreme Court takes a contrary view and allows recovery against the government on implied contract in

[1] Knote *vs.* U. S., 95 U. S. 149. [2] Fisk *vs.* Police Jury, 116 U. S. 131.

such cases.[1] The greatest difficulty, however, is encountered in distinguishing between implied contract and tort in cases where the government, through the unauthorized act of its officer, has received and is in the enjoyment of some benefit at the expense of some individual. An instance or two will illustrate this. Where an inventor is in constant communication with the government officers, exhibiting his inventions and urging their adoption, and they use a device covered by his patent, a contract to pay a reasonable royalty will be implied ;[2] but where the United States made use of a patented process against the remonstrance of a patentee, it was held that the court of claims was without jurisdiction, as no contract to pay could be implied.[3] Compensation has also been allowed, on the theory of implied contract, for the appropriation of private land to public use, where the government asserts no title and where the land can be held to have been taken under right of eminent domain.[4] But no implied contract to pay will be raised, where the possession of the land has been acquired and maintained under a different and adverse title,[5] or by the tortious act of an officer of the government.[6] From these cases it would appear that an implied contract requires the existence of some contract relation between the parties, some dealing with the claimant on the basis of his acknowledged right ; in one case at least, however, it has been held that where money of an innocent person has gone into the treasury of the government by fraud to which its agent was a party, such money can be recovered on implied contract.[7] But on the whole the liability on implied contract has not been allowed to be used as a means of impairing the immunity of the government in cases where it can make out a clear case of tort. The clearer the legal wrong and the more unjustifiable the act complained of, so

[1] Clark *vs.* U. S., 95 U. S. 539.
[2] U. S. *vs.* Palmer, 128 U. S. 262. Berdan's case, 26 Ct. Cl., 48.
[3] Schellinger *vs.* U. S., 24 Ct. Cl., 278.
[4] U. S. *vs.* Gt. Falls Manuf. Co., 112 U. S. 545.
[5] Hill *vs.* U. S., May 15, 1893.
[6] Langford *vs.* U. S., 101 U. S. 341.
[7] U. S. *vs.* Bank, 96 U. S. 30.

much more undisputed is the exemption of the government from legal liability.

For if the law appears to be well settled on one point, it is that the government, as a matter of principle, is not liable on tort. The federal statutes expressly exclude causes of action sounding in tort from the jurisdiction over the government. But the immunity is recognized by law without reference to jurisdictional limitations. It exists where, as in New York, the state can be sued on any cause of action. This irresponsibility for tort may be, and has been, placed on various grounds. Thus it is said that the tortious act can be committed only through the agency of an officer, and that the act of the officer is not the act of the government. This is the familiar plea of *ultra vires*, which has been repudiated by the courts in the case of ordinary corporations. It has also been held that laches, neglect of duty or wrongful conduct is not imputable to the government — that the sovereign must be considered as incapable of committing any wrong. This, however, is not an argument, but a convenient fiction. It has further been said that no liability can in any case be fastened upon the government except by its own consent, and that it cannot therefore be held responsible for any tort until it has expressly assumed such liability.[1] Nothing more simple and logical than this explanation, if it could be made to harmonize with a sense of right and justice. To satisfy this, the old argument of public policy has been used very frequently and with great confidence. In the language of Judge Story,[2] which has been quoted repeatedly by the courts,

> it is plain that the government itself is not responsible for the misfeasances or wrongs or negligences or omissions of duty of the subordinate officers or agents employed in the public service; for it does not undertake to guarantee to any persons fidelity of any of the officers or agents whom it employs; since that would involve it in all its operations in endless embarrassments and difficulties and losses, which would be subversive of the public interests.

[1] Rexdorf *vs.* State, 105 N. Y. 229.

[2] Agency, p. 319.

And the United States Supreme Court, quoting these words, adds :

> The general principle which we have already stated as applicable to all governments forbids, on a policy imposed by necessity, that they should hold themselves liable for unauthorized wrongs inflicted by their officers on the citizen, though occurring while engaged in the discharge of official duties.[1]

But, whatever the reasoning relied on, the principle itself has always been regarded as firmly established and has never, it seems, been questioned or denied by the courts.

Yet it may be interesting to inquire further into the principle, even at the risk of going into a discussion somewhat theoretical in its nature ; for a tort, far more than a contract, is apt to raise and involve fundamental questions of rights and legal relations.

Again it will be proper to make certain distinctions. It is of the essence of government, and therefore the highest duty of the state, that it should assume certain functions affecting the citizens — the preservation of the peace ; the protection of person and property ; the administration of justice ; the promotion of the public welfare. But these duties constitute no civil obligations ; they are beyond the operation of the ordinary rules of law. Some of these duties are perhaps capable of being raised into legal liabilities ; as, for instance, if the state should hold itself responsible for damage done to property in consequence of riots, as it does in Germany, or as municipal corporations are frequently held in this country. As a rule, however, these duties are of such a nature that they cannot bind the discretion of the sovereign power ; these obligations correspond to no private right on the part of any individual citizen, and they produce no private cause of action.

But the question of private right may arise in opposition to the action of the state, and it may present itself in two entirely different relations. In the first place the action of public officers representing the state in the exercise of public

[1] Gibbons *vs.* U. S., 8 Wall. 269, 274.

functions may exceed the bounds set to it by law or the constitution, and may invade or violate individual rights of person or property. In the second place, the state may enter into relations with its citizens similar to those existing between citizens individually, into which the element of public power does not enter, or enters but remotely, and may then, in connection with such a relation, by act or omission, inflict some injury upon a private right. This distinction, so familiar to the continental law of Europe, has more than once been recognized incidentally in the decisions of our courts, but has remained barren of legal consequences. It is based upon intrinsic differences in the action of the state, which may accomplish its purposes either by sovereign command or by using contract and property as its instruments, and which may become vested with rights that have no direct connection with its public functions.

Now, where the relation is that between sovereign and subject, *i.e.*, authoritative in character, an injury may be inflicted upon private rights in various ways. An officer may, in the exercise of functions entrusted to him, go beyond his lawful authority : he may use excessive force ; arrest where he has no power to do so ; inflict greater punishment than the law allows or the case warrants. Or an officer may invade private rights under an authority apparently lawful but resting upon an unconstitutional statute ; or he may mistake his authority where the law is doubtful ; or, where his action depends upon the existence of certain facts, he may err as to the true state of facts. It may be urged that in all these cases the state has no concern with the wrong done, that it is the personal act of the officer. Such, indeed, is the theory of our law ; valuable in its assertion of a personal liability on the part of the officer, but, in so far as it denies any connection of the state with the act, repugnant to the general theory obtaining with regard to corporations — that, since every authority involves the possibility of its abuse, they are responsible for the acts of their agents done within the sphere of their employment.

Assuming the wrongful act to be imputable to the state — incident to the unavoidable imperfections of a machinery so complicated as its system of administration, the state enjoys, of course, by virtue of its sovereignty, the privilege of exempting itself from liability. A government which should hold itself responsible to all its citizens for any legal injury suffered by them through the exercise of public powers,— which, in other words, should guarantee the just and perfect operation of its administrative and judicial machinery, might find itself confronted with claims and vexed with suits to such an extent as to be driven to a limitation of its liability. But leaving aside considerations of public policy, the view that the tort is an act of the government by no means entails the government's liability as a logical conclusion. The rule that a tort creates a liability for damages is a rule of private law; it therefore applies to relations of the private law only. The position of the state, where it acts in the exercise of sovereign and governmental functions, is, however, entirely beyond the sphere of private law, and must be judged by different standards. If the courts were called upon to administer abstract justice, they might find ample ground in many cases for decreeing reparation of legal injuries by the state; but applying, as they have to, principles of the common law, they cannot evolve a liability of the state in its sovereign capacity, for the reason that governmental functions do not create civil causes of action, and that rules of private liability are inadequate to govern cases where no private relation exists. Where justice demands that the government should be made responsible for damages suffered through misconduct in the exercise of its public powers, express statutory enactment is required to create such liability.

The state, however, in dealing with the citizen, does not always act in the character of a sovereign who commands and compels, as a representative of law and authority; it can by virtue of its corporate capacity equally well entertain relations of the private law, becoming a holder of private rights and treating with individuals on a basis of equality. In order to

determine whether the state acts in a private law capacity, it is not always sufficient to analyze a particular transaction without reference to the purpose which it subserves and the system of which it forms part. We can imagine a contract between individuals for the carrying of letters ; but the postal service of the government forms a great public institution, in which the element of profit is subordinate, the payment is disproportionate to the service rendered, and the rules of contract with its incidents are therefore to a great extent inapplicable. A payment of money into court is in form similar to a deposit under the private law ; yet, such payment being merely a mode of protecting private rights that is auxiliary to the administration of justice, the government in receiving the money does not enter into a civil transaction and does not assume all the obligations of a depositary. Gneist therefore justly remarks that the liability of the consolidated fund in England for private deposits embodies a principle formerly unknown to English administrative law.[1] The fact that prisoners are held to labor does not fasten upon the state an employer's liability ; for the employment is merely an incident to the prison discipline, and the state is therefore not liable for injury suffered through defective implements.[2] The same view is generally taken where the holding and management of property is required by some public function of the state, although it would be easy and proper in such cases to sever the element of beneficial ownership from the public functions to which it is incident (especially in cases of negligence in the care of public buildings).

But there are cases where the relation to which the state is a party is clearly private — where there is no direct connection with governmental or public functions. So where the government happens to manage industrial enterprises, where it owns lands escheated or forfeited to it, where it acquires railroad property through foreclosure of mortgages held by it, where it enters into contracts for the furtherance of its beneficial interests. Now whenever the government thus stands in the

[1] Gneist, Das Englische Verwaltungsrecht, II, 1031.

[2] Lewis *vs.* State, 96 N. Y. 71.

position of a holder of private rights, all arguments in favor of its immunity from tort that are drawn from public policy or from the nature of governmental functions, fall to the ground. In such a relation, its sovereignty need in no wise be involved — is, indeed, a mere accident. The obligations incident to the holding of property and the carrying on of industries are imposed by the conditions of social existence, and are essential to the proper functions of ownership. The justification of any exemption from these obligations must be found, not in the privileged position of the owner, but in the exceptional nature of the purposes for which the property is used. Granting that the state can hold property for purposes similar to those of an individual owner, it follows logically that it should hold on similar conditions. A privilege which cannot be explained by the public functions and powers of the state is anomalous.

The principal torts which may be imputable to the government in connection with its private relations, are negligence, non-compliance with statutory regulations, nuisance, trespass and the disturbance of natural easements. It is characteristic of these torts that they violate obligations which are cast by law upon the ownership or occupation or control of property, that they are sometimes not directly attributable to a specific act of any particular agent, and that the existence of the wrongful condition is usually of some benefit to the owner. The liability of the state in these cases is demanded not only by justice but by the logic of the law; its immunity cannot be placed upon any convincing arguments. It is to be regretted that the courts have always denied the liability of the sovereign in sweeping terms; but the cases so far decided do not perhaps absolutely preclude the acceptance of a more satisfactory doctrine.[1]

In order that the view here taken may not be regarded as theory pure and simple, it may be proper to corroborate it by the analogy of another department and of other systems of law. A municipal corporation, it is true, is no sovereign body; yet it is an integral part of the organization of government. The

[1] See Ballou *vs.* State, 111 N. Y. 496.

incorporation enables it to hold private rights and at the same time subjects it to the jurisdiction of the courts; its public functions are nevertheless governmental in character. Therefore, like the state, the municipality cannot be held liable for torts committed in the exercise of its delegated governmental powers; the public relation protects it from private responsibility. But where it acts in a private or corporate capacity for its beneficial interests, its liability for tort is clear.[1] Now the state, like the municipal corporation, can have private and beneficial interests, and it may likewise be subjected to the jurisdiction of the courts. If then the analogy of the state protects the municipal corporation from liability in its public relations, the analogy of the municipal corporation should make the state liable in its private and beneficial relations.

The law of Germany and France protects the administration from interference by the courts to an extent unknown to our law; yet it is well settled that the state, by entering into private relations, subjects itself to the jurisdiction of the civil courts and becomes liable like any other holder of private rights. The discussion in Germany as to whether it should be held liable on tort has turned only on the general question, whether a corporation can become liable for the torts of its agents; the immunity has never been asserted on other grounds, and the responsibility for torts committed in connection with purely private relations appears now to be the accepted law in both countries.[2]

A liability in tort would of course be barren if there were no jurisdiction over the state, but so would a liability in contract, which is yet undoubted. The liability, to be effective, demands the possibility of suit against the government, but as a matter of theory and principle the question of liability is independent of that of jurisdiction.

It may be well to summarize the conclusions arrived at in the course of these remarks, both as to the actual law and as to its possible improvements:

[1] Dillon, Municipal Corporations, §§ 975–985.

[2] Meyer, Deutsches Staatsrecht, § 149. Mayer, Französ. Verwaltungsrecht, § 58.

1. Jurisdiction cannot be exercised by the courts over the state except by its consent. This consent may be, and partly is, embodied in statutes providing permanently for suits against the government, with or without limitations of jurisdiction. Such jurisdiction should be generally recognized, at least with regard to private causes of action.

2. Where jurisdiction over the state does not exist, the courts should not take cognizance over suits against officers, to which the state would otherwise be a proper or necessary party. Such is the recognized law, with this modification, that the courts will enjoin an actual or threatened invasion of private property under pretended authority of the state.

3. Jurisdiction over the state does not mean power to enforce judgments against the state. All that can be required is a judicial examination of claims. Compliance with the judgment must be secured by statutory provisions or left to the legislature.

4. An expressly assumed obligation creates a legal liability on the part of the state.

5. A tort committed in the exercise of governmental functions creates no private cause of action against the state; where a liability is demanded by justice, it must be created by statute.

6. A tort committed in connection with private relations should give rise to a corresponding civil liability, with such statutory exceptions as may be dictated by public policy. This is not the recognized law, but seems to be demanded on general principles.

If some of these conclusions still rest in theory, it should be remembered that a true theory often foreshadows the actual development of the law; in so far as they are not recognized, it seems that the government places itself beyond the pale of those principles which constitute what the Germans call the *Rechtsstaat.*

ERNST FREUND.